(1)
Supreme Court, U.S.
FILED

941385 JAN 17 1995

OFFICE OF THE CLERK

****

In the United States Supreme Court

****

October Term, 1994

****

Philip Anthony Bonadonna,
Petitioner
v.
United States of America,
Respondent

****

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

****

Petition for Writ of Certiorari

****

Frank J. Petrella, Esq.
Counsel for Petitioner
2302 Brockett Road
Tucker, Georgia 30084
404-414-1092

45pp

QUESTION PRESENTED FOR REVIEW

Will this Court invoke its supervisory powers to review the denial of a motion to vacate judgment and sentence when a criminal defendant has been denied both collateral relief and an evidentiary hearing on a Section 2255 petition and he presented the trial court with a prima facia non-frivolous double jeopardy violation stemming from the Government's purposeful, simultaneous prosecution of the defendant in three separate federal district courts and when the Government's exercise of due diligence would have clearly disclosed one overall course of criminal conduct?

TABLE OF CONTENTS

Question Presented For Review i

Table of Contents ii

Table of Authorities iii

Opinions Rendered in the Case 1

Jurisdiction of this Court 1

Constitutional Provisions 2

Statement of the Case 2

Reasons for Granting the Writ 11

Conclusion 21

Appendix . . . . .

District Court Opinion APP-1

Per Curiam Affirmance APP-16

Denial of Petition for Rehearing APP-17

TABLE OF AUTHORITIES

CASES CITED — PAGE

*United States v. Boldin

772 F.2d 719 (11th Cir. 1985) . . . 12, 13, 15, 21

*United States v. Guido

597 F.2d 194 (9th Cir. 1979) 16

*United States v. Jacobson

547 F.2d 2114 (2d Cir. 1976) 16

*United States v. Phillips

664 F.2d. 971 (1981) 16

*United States v. Reed

980 F.2d 1568 (11th Cir. 1993) 11, 12, 13, 17, 21

*United States v. Stricklin

591 F.2d 1112 (5th Cir. 1979) . . . 12, 14, 15, 21

OPINIONS RENDERED IN THE CASE

Petitioner's motion to vacate conviction and sentence filed pursuant to Title 28 United States Code, Section 2255 was denied in an unpublished per curiam opinion of the Eleventh Circuit Court of Appeals. A petition for rehearing and rehearing en banc was denied in an unpublished opinion. A copy of the district court opinion, the unpublished per curiam opinion, and the denial of the petition for rehearing and rehearing en banc appear in the Appendix.

JURISDICTION OF THIS COURT

The denial of Petitioner's motion to vacate conviction and sentence was denied on July 28, 1994. A petition for rehearing and rehearing en banc was denied on October 20, 1994. This Court has jurisdiction to review the judgment of the Eleventh Circuit by writ of certiorari pursuant to Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution...

> ...[N]or shall any person be subject for the same offence to be twice put in jeopardy of the life or limb; ...nor be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On January 20, 1984, three indictments naming Petitioner were simultaneously unsealed in Little Rock, Arkansas, Atlanta, Georgia, and Los Angeles, California. Petitioner proceeded to trial on the Arkansas indictment in June, 1984. He was convicted of conspiracy to import heroin and conspiracy to possess marijuana with intent to distribute and was sentenced to a twenty year term of incarceration. The California indictment alleged a conspiracy to import and importation of marijuana from Colombia to San Pedro, California. The Atlanta indictment charged Petitioner with a continuing criminal enterprise, RICO conspiracy, substantive RICO, and

other cocaine related offenses. Petitioner was convicted in Atlanta in October, 1984. He received a sixty-five year term of incarceration to be served consecutively to the Arkansas sentence.

After perfecting a direct appeal, Petitioner filed a motion to vacate his sentence and conviction pursuant to Title 28, United States Code, Section 2255. In his motion to vacate, Petitioner asserted that the criminal activity alleged in the Georgia, Arkansas, and California indictments constituted a continued course of conduct involving a continued time frame, similar criminal objectives, overlapping criminal defendants and geographical overlapping.

Since the date of his conviction, Petitioner obtained information through the Freedom of Information Act which revealed that Attorney General William French Smith and Associate Attorney General Lowell Jensen acknowledged that the Atlanta, Little

Rock, and Los Angeles indictments were all related and reflected one all-encompassing criminal venture.

Petitioner's motion to vacate was simple and straightforward: the district court in Atlanta was without legal jurisdiction to impose judgment and sentence in this case. Because the government had trifurcated one large on-going conspiracy into multiple conspiracies which were separately prosecuted in separate districts, Petitioner's double jeopardy protections were violated. As the pre-indictment criminal investigation in this case progressed, the government had actual knowledge of the over-all scope of Petitioner's criminality. Petitioner averred that the exercise of due diligence by Government prosecutors would have necessitated the unified trial of Petitioner on these charges and would have barred any subsequent prosecutions once Petitioner was convicted in the Arkansas case. Alternatively, Petitioner invoked the supervisory powers of the district court to vacate his

conviction and sentence as to all counts of which he was convicted.

There can be little doubt that the criminal activities of Petitioner between 1981 and late 1983 were widespread and widely known to federal law enforcement officials. More importantly, however, was the Government's knowledge that those criminal activities were part of one overall encompassing criminal venture. During a pre-trial conference, Government counsel noted, "Well, Your Honor, ...what a busy man Mr. Bonadonna was. He was involved in many, many things and many, many different transgressions." This same theme of Petitioner's 'widespread criminal conduct' was reiterated at a second pre-trial conference. Prosecutors informed the district court that... "Mr. Bonadonna had a legion of criminal activities apparently going on at this period of time." Exhibits supporting the Section 2255 petition included Freedom of Information Act disclosures

Petitioner obtained in 1990 from the Office of the Attorney General of the United States. Included in the F.O.I.A. documents were: (1) a Justice Department "Narcotics Newsletter" dated January-February, 1984. The Little Rock, Arkansas and Los Angeles, California indictments were specifically named as being related to the Atlanta indictment; (2) a press release issued by Associate Attorney General D. Lowell Jensen:

> In the early stages, two separate drug cases were developed through interdiction efforts. It was only after the Task Force work began that we became aware of the many tentacles of the trafficking operation. As all of them were followed, the existence of this incredible drug organization was discovered and the dimensions of its cocaine dealing documented.

(3) a January 23, 1984 press release prepared by the Eastern District of Arkansas regarding the Little Rock indictment. The indictment was described as alleging a conspiracy to import marijuana and heroin into the United States from Santa Marta, Colombia. Individuals named in the press release were prominently mentioned

in the Jencks materials provided in the Atlanta case. Government investigators knew of the overlap of defendants as early as the Fall of 1981, the same time frame as the Arkansas activity. The Arkansas marijuana was described as being transported to Lexington, Kentucky. During the severed bench trial of one of Petitioner's co-defendants, the Lexington marijuana transaction was discussed in detail. The district court allowed evidence of the involvement with this same load of marijuana as being "inextricably intertwined" with the Atlanta indictment. In reference to the smuggling of the Arkansas marijuana, government counsel in Atlanta argued, "That conversation I suggest clearly shows her intent to be part of an ongoing drug importation, be it cocaine or be it marijuana". According to government reports, the Arkansas marijuana was transported to Lexington, Kentucky and was obtained by Rebecca Steen. Steen was a named co-defendant of Petitioner in the

Atlanta indictment. United States Attorney Proctor noted that the investigation in Arkansas was related to the "national investigation code-named 'Operation Southern Comfort'. The Southern Comfort investigation was conducted by the Atlanta Task Force".

On January 20, 1984, the Arkansas indictment was unsealed. Petitioner was charged with two counts of conspiracy to possess and conspiracy to import marijuana and heroin. The indictment alleged that between August 1, 1981 and December 31, 1981 Petitioner, Charles Alaimo, Irwin Lane, and other named defendants conspired with Bruce Litsky to import marijuana and heroin into the United States. Petitioner was the only named defendant to proceed to trial in Arkansas. Government witness Bruce Litsky arranged for an aircraft to transport an existing load of marijuana from Colombia, South America. Money to finance the flight was obtained by Litsky from Petitioner. Litsky

understood that one of Alaimo's financial backers in the Arkansas smuggling venture was Al Berlin. As reflected in evidence developed during Petitioner's Atlanta trial, Al Berlin was the individual whom Petitioner and Alaimo met in Miami, Florida in October, 1981 to arrange for the distribution of cocaine in the Atlanta indictment. Testimony concerning the "Arkansas Connection" of Operation Southern Comfort was admitted during the Atlanta trial. Bruce Litsky gave graphic detail of the individuals involved, the plans established, and the methods of operation. Atlanta prosecutors argued that the Arkansas marijuana testimony "had a dual purpose at a minimum"...meaning that there was an overlapping of the marijuana and cocaine transactions. This "overlapping" theme was repeated during Petitioner's Atlanta trial when prosecutors argued against a defense motion to limit the post-arrest seizure of the telephone book of which made reference to "Jack and Pete and

Weed in New York City". The government's response was that the telephone book was "extremely probative in terms of Mr. Rosenthal's relationship with Mr. Bonadonna, Mr. Alaimo, and his association with New York...". Specific arguments were made by government counsel that the DC-3 aircraft purchased by Petitioner in California had a dual purpose, namely, the importation of both marijuana and cocaine.

As early as January, 1983, agents of the Federal Bureau of Investigation in Los Angeles informed the Miami and Atlanta agents that during Title III electronic surveillance coverage in November, 1982, a smuggling venture was uncovered involving the importation of marijuana on a ship named "The New Horizon". On January 25, 1983, Los Angeles agents informed the Atlanta and Miami field offices that a gentleman named Culotta was an intermediary in the marijuana smuggling venture. Tape-recorded conversations centering around

Culotta and the New Horizon were tendered to Petitioner as Rule 16 discovery material in the Atlanta proceedings.

REASONS FOR GRANTING THE WRIT

In denying Petitioner's motion for collateral relief and an evidentiary hearing to prove his Section 2255 allegations, the Eleventh Circuit departed from the accepted and usual course of judicial proceedings where prima facia non-frivolous double jeopardy claims have been raised.

Allegations of double jeopardy violations have found themselves in turbulent waters in recent years. Fortunately, double jeopardy claims in complex multi-level criminal activity had been given definitive guidance in the Eleventh Circuit in United States v. Reed, 980 F.2d 1568 (11th Cir. 1993). As in the case of Reed, the instant matter involves complex statutory crimes [CCE, RICO conspiracy, RICO, and other conspiracies].

Because of the "conceptual closeness" of conspiracy offenses and CCE's, further analysis is required as to whether double jeopardy bars a CCE prosecution based upon a previous drug conspiracy conviction. Reed, at 1575.

A drug conspiracy prosecuted under Title 21, United States Code, §846 or §963 is a lesser included offense of CCE. Double jeopardy would be violated if a defendant was prosecuted for the greater offense of CCE following a conviction of the lesser included offense of conspiracy. Reed, supra, at 1576; United States v. Stricklin, 591 F.2d 1112, 1123 (5th Cir. 1979).

> Moreover, "the double jeopardy clause bars a prosecution under section 848 where the predicate felony violation was a [] conspiracy and the section 848 prosecution is based on the 'same criminal agreement.'" United States v. Boldin, 772 F.2d 719, 730 (11th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986) (decided after Garrett) (emphasis added); Stricklin, 591 F.2d at 1123. In other words, "[a]ny section 846 conspiracy for which [defendant] was subject to prior jeopardy cannot be used by the government in [a later] prosecution to satisfy the

collaboration requirement of section 848." Boldin, 772 F.2d at 731.

Reed, supra, at 1576-1577.

Judge Kravitch, speaking for the Eleventh Circuit in Reed, noted that the "case law makes clear" that the prosecution will confront double jeopardy claims when a §848 offense is prosecuted after obtaining a §963 or §846 offense unless the collaboration element of §848 is satisfied by proving a newly discovered conspiracy. Reed, supra, at 1577; citing Boldin, 772 F.2d at 731. [Emphasis added]

Petitioner contended that his double jeopardy protections were violated because he was subject to a purposeful tri-furcated prosecution in three separate federal districts in Arkansas, Georgia, and California, although the government knew full well that the conspiratorial conduct of all three prosecutions was continuous, related, and otherwise indistinguishable for double jeopardy purposes. The government in the

instant matter cannot invoke either continued criminal conduct or the exercise of due diligence as an exception to the double jeopardy bar. Petitioner was arrested upon the simultaneous unsealing of all three indictments in January, 1984. All conduct for which he was prosecuted in each district preceded the date of his arrest and were facts well known to government agents and prosecutors who coordinated the tri-furcation of the offenses. Not only does the record reflect that all facts surrounding Petitioner's widespread criminal activities were known to government prosecutors, it appears that the tri-furcation of the charges was a purposeful plan to expose Petitioner to three successive prosecutions which were to culminate in the Atlanta prosecution and convictions.

Petitioner presented a prima facie non-frivolous double jeopardy claim. The burden shifted to the prosecution to establish by a preponderance of the evidence that the indictments charge separate offenses.

United States v. Stricklin, 591 F.2d 1112 (5th Cir. 1979).

For the Government to have validly prosecuted the §848 offense after a §846 conviction without invoking the double jeopardy bar, the Government was required to prove a newly-discovered conspiracy to satisfy the 'collaboration with five or more persons requirement.' United States v. Boldin, supra, at 731; United States v. Stricklin, supra, at 1124. (5th Cir. 1979). Not only did the Government not have evidence of a separate or newly discovered conspiracy to satisfy the collaboration element of §848, the Government, in its exercise of due diligence, had irrefutable information that the Atlanta prosecution was a continuation of the single course of conduct embarked upon by Petitioner in Arkansas. See, Boldin, supra, at 732.

Because the Government's knew of Petitioner's continuing course of criminal conduct and purposefully divided that large criminal venture, all counts in the

Atlanta indictment should have been barred as violative of the double jeopardy clause of the Fifth Amendment. Such a formulation would be in accord with the former Fifth Circuit opinion of United States v. Phillips, 664 F.2d. 971 (1981). Under the district court's supervisory power over the administration of justice, the trial judge had the authority to correct unfairness. United States v. Guido, 597 F.2d 194 (9th Cir. 1979). The Guido panel held that fragmentary prosecutions resulting from the bifurcation of a case must be prohibited, citing United States v. Jacobson, 547 F.2d 2114 (2d Cir. 1976).

This is not a case involving the accidental and independent decision of three different jurisdictions to indict an individual defendant. The Justice Department methodically created three legal scenarios to Petitioner's detriment. Additionally, their actions placed Petitioner in a position where he had to defend himself from similar criminal conduct from coast to coast creating an

atmosphere of oppression and harassment.

In denying Petitioner's double jeopardy claim, the district court segregated its argument in terms of the RICO counts and the "remaining counts". As to the RICO counts, the district court analyzed Petitioner's double jeopardy claim in terms of a Grady v. Corbin argument. The district court ruled that...

> The court finds that the government did not violate the Double Jeopardy Clause by introducing that Bonadonna's prior criminal acts for which he'd already been convicted to establish the predicate acts required for a RICO prosecution.

Petitioner did not assert such an argument in his petition. Furthermore, Petitioner cited the district court to the Eleventh Circuit's then recent opinion of United States v. Reed. The analysis of the district court should have been predicated upon Reed.

As to the "remaining counts", the district court correctly noted that Petitioner argued that the Atlanta prosecution was based upon conduct which "was part of

a unified conspiracy". Correctly noting that once a defendant established a prima facia case of a double jeopardy bar, the burden would then shift to the government to prove "by a preponderance of the evidence that the indictments involved charge separate offenses". The district court concluded that Petitioner "has not established a prima facia case of double jeopardy". The district court interpreted the materials submitted by Petitioner as presenting only a "conclusory statement" that a unified conspiracy existed. The district court's analysis of "the relevant factors" as establishing an absence of evidence of a unified conspiracy clearly ignored the government's own assertions gleaned from the press releases issued on the day of the unsealing of the three indictments. Those materials clearly professed that the Arkansas, California, and Atlanta indictments were part and parcel of the same course of criminal activity and were related to each other. That activity was

described as tentacles of the octopus of organized crime operating on a large-scale basis in this country. The concerted efforts of closely coordinated federal and state law enforcement personnel were viewed as jointly ferreting out Petitioner's course of conduct. Secondly, the district court apparently did not give any weight to the statements of lead government counsel during the severed trial of Rebecca Steen, one of Petitioner's co-defendants. In the subsequent trial of Rebecca Steen, government counsel stated that the marijuana and cocaine smuggling conspiracies were part and parcel of the same overall conspiratorial agreement. For some inexplicable reason, Steen was not prosecuted in the Arkansas prosecution. One can only surmise that the failure to name her in the Arkansas indictment was a conscious and deliberate attempt by government prosecutors to draft charges against Petitioner so as to appear to be separate criminal conspiracies in the three

districts in which he was charged. Lastly, the district court incorrectly noted that "only Bonadonna and Charles J. Alaimo were included" in both the Arkansas and Atlanta cases. The district court failed to recognize that Rebecca Steen [a close associate of Alaimo who assisted in the further distribution of the Arkansas marijuana and the Atlanta cocaine], Uncle Al Berlin [the financial backer of both the Arkansas and Atlanta "tentacles" of the drug smuggling operation], Bruce Litsky [the individual responsible for arranging for transportation and further distribution of both the Arkansas marijuana and Atlanta cocaine], and Irwin Layne [a close friend of Petitioner and Bruce Litsky who distributed both the Arkansas marijuana and Atlanta cocaine for Petitioner and Alaimo] were prominently named in both the Arkansas and Atlanta prosecutions.

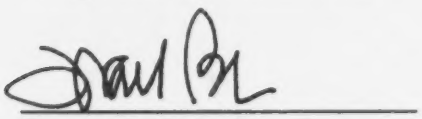
As a matter of law and fact, the district court erred in finding that Petitioner did not establish a prima

facia case of double jeopardy. Under the authority of United States v. Stricklin, supra, United States v. Boldin, supra, and Reed, supra, it was error for the district court to rule that Petitioner had not established a prima facia case. It was further error for the court to fail to shift the burden to the government to prove by a preponderance of the evidence that the indictments involved charged separate offenses.

CONCLUSION

The action of the Eleventh Circuit Court of Appeals violated Petitioner's double jeopardy and due process protections and departs from the accepted and usual course of judicial proceedings where prima facia non-frivolous double jeopardy claims have been raised. The actions of the Eleventh Circuit call for an exercise of this Court's power of supervision. Petitioner prays that a writ of certiorari issue.

Respectfully submitted,



Frank J. Petrella, Esq.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
V.	)	CASE NO.
	)	1-84-CR-14-GET
	)	
PHILIP ANTHONY BONADONNA	)	
	)	
Defendant	)	

ORDER

The above-styled matter is presently before the court on the defendant's motion to vacate sentence [docket no 6].

Background

The defendant, Philip Anthony Bonadonna (Bonadonna or the defendant), was indicted by the federal grand jury in the Northern District of Georgia on January 14, 1984. Specifically, Bonadonna was charged in nine counts of the 55 count indictment:

Count 1 - violation of RICO, 18 U.S.C. § 1962.

Count 2 - violation of RICO, 18 U.S.C. § 1962

(a) violation of the Travel Act, 18 U.S.C. § 1952;

(b) violation of 21 U.S.C. § 841, intent to violate controlled substances act;

(c) violation of 21 U.S.C. § 846, attempt and conspiracy to violate controlled substances act;

(d) violation of 21 U.S.C. § 952, importation of controlled substances.

(e) violation of 21 U.S.C. § 963, attempt and conspiracy to import controlled substances.

Count 4 - violation of 21 U.S.C. § 848, continuing criminal enterprise.

Count 13 - violation of 21 U.S.C. § 963, conspiracy to import cocaine.

Count 14 - violation of 21 U.S.C. § 952, importation of controlled substances.

Count 19 - violation of 21 U.S.C. § 841, possession with intent to distribute cocaine.

Count 38 - violation of the Travel Act, 18 U.S.C. § 1952.

Count 39 - violation of the Travel Act, 18 U.S.C.

§ 1952.

Count 42 - violation of the Travel Act, 18 U.S.C. § 1952.

The defendant was tried and convicted on each of the above-listed counts. The Eleventh Circuit affirmed all of the convictions except count 13, which was reversed. United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986).

Bonadonna filed the instant motion to vacate the sentence under 28 U.S.C. § 2255 on September 8, 1992. The motion states four grounds for relief. First, Bonadonna contends that his conviction should be vacated because it was obtained in violation of the Due Process and Double Jeopardy Clauses of the Fifth Amendment. Bonadonna essentially contends that he was tried and convicted in Arkansas for the same offense for which he is now being prosecuted. Second, the defendant contends that the government failed to establish three Title 21 offenses as a necessary predicate

to his conviction for engaging in a continuing criminal enterprise. Third, Bonadonna urges that the government committed a Brady violation in not providing him with information regarding another individual who was indicted for murdering the Columbian Minister of Justice. Fourth, Bonadonna asserts that the court wrongfully failed to submit to the jury a special interrogatory.

Discussion

I. Double Jeopardy.

The basis for Bonadonna's double jeopardy claim is his assertion that his instant conviction is duplicitous of his convictions under an indictment handed down in Arkansas. In the Arkansas indictment, Bonadonna was charged with conspiracy to import marijuana and heroine [sic] from August 1, 1981 to December 31, 1981. The defendant asserts that he was prosecuted in the instant case for the same conduct that gave rise to his

convictions under the Arkansas indictment and that therefore the conviction should be vacated as violating the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause provides three basic protections: it "protects against a second prosecution for the same offense after acquittal[; i]t protects against a second prosecution for the same offense after conviction[; a]nd it protects against multiple punishments for the same offense." Brown v. Ohio, 431 U.S. 161, 165 (1977); Mars v. Mounts , 895 F.2d 1348, 1353 (11th Cir. 1990).

A. **The RICO Counts.** Bonadonna argues that the court should apply the recent Supreme Court decision in Grady v. Corbin, 110 S. Ct. 2084 (1990), and hold that his prior convictions under the Arkansas indictment cannot be used by the government to establish the predicate offenses necessary for the RICO conviction. The Eleventh Circuit has expressly addressed

this position and has rejected it. See United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991).

In Gonzalez, the court considered a defendant's double jeopardy challenge of his convection for RICO conspiracy. The basis for the challenge was a prior drug conviction for possession, importation and conspiracy. The defendant claimed that the government improperly introduced evidence of the earlier crimes as predicate offenses for the RICO conviction. Id. at 1535. The court first applied the two step test set forth in Garrett to determine whether the successive prosecutions violated the Double Jeopardy Clause. Id. First, the Eleventh Circuit concluded that "Congress authorized multiple prosecution for RICO and its predicate drug offenses." Gonzalez, 921 F.2d at 1536, United States v Boldin, 722 F.2d 719 (11th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). Second, the court analyzed the Supreme Court's opinion in Grady to determine whether

the predicate offense is the "same offense" as the RICO charge within the meaning of the Double Jeopardy Clause. Id. The Eleventh Circuit determined that " the Supreme Court's holding in Garrett clearly allows for subsequent prosecutions for complex crimes such as the RICO violation [the defendant] is charged with, notwithstanding an earlier conviction on a predicate charge." Id. at 1538.

Accordingly, the court finds that the government did not violate the Double Jeopardy Clause by introducing evidence of Bonadonna's prior criminal acts for which he had already been convicted to establish the predicate acts required for a RICO prosecution.

B. The Remaining Counts. In regard to the remaining counts, Bonadonna contends that his conviction under the Arkansas indictment for conspiracy to import marijuana and heroine [sic] preclude his subsequent convictions under the Atlanta indictment

because the conduct that was the subject of both indictments was part of a unified conspiracy. Under this theory, Bonadonna could not be re-indicted in Atlanta for a single conspiracy for which he had already been convicted in Arkansas.

In determining the existence of a unified conspiracy, the court should consider the following factors: "(1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) . . . the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place." United States v. Henry, 661 F.2d 894, 896 (Former 5th Cir. Unit B Nov. 1981). Utilizing the above factors, a defendant pleading double jeopardy must present evidence which establishes a prima facie claim. United States v. Futch, 637 F.2d 386, 389 (5th Cir. Unit B Feb. 1991). Only if the defendant establishes such a

prima facie case does the burden shift to the government to prove by a preponderance of the evidence that the indictments involved charged separate offenses. Id.

After considering the evidence presented by Bonadonna, the court concludes that he has not established a prima facie case of double jeopardy. Bonadonna's brief in support of his motion makes on the conclusory statement that "[i]n the instant matter, the methods of transportation, the methods of distribution of the contraband, and the identity of the suppliers constitutes evidence of the unified conspiracy." (Def. Mem. at 19.) This reliance on the similarity between methods of transportation and distribution is not persuasive. Many conspiracies use air transportation to import drugs and the use of similar methods of transportation does not establish that there was a single conspiracy. See Futch, 637 F.2d at 390 (similar use of shrimp boats for importation and trucks for distribution

did not provide convincing evidence of a unified conspiracy because such methods are frequently used in the drug trade). See also Henry, 661 F.2d at 897 n.4 (approving of reasoning expressed in Futch).

Further, an analysis of the relevant factors establishes the absence of evidence of a unified conspiracy. The evidence shows that the time periods of the conspiracies did not overlap; the substantive acts of the Atlanta cocaine conspiracy occurred in mid- to late-1982 and through 1983 while the Arkansas indictment covered a time period running only from August 1, 1981 through December 31, 1981. It is also apparent that the places were the importation occurred were not the same. The overt acts involved in the Arkansas indictment concerned importing marijuana and heroine from Columbia, South America to an airstrip in Soperton, Georgia and therefore attempting to deliver the marijuana to Lexington, Kentucky and the heroine [sic]

to New York. The substantive overt acts of the Atlanta cocaine importation of cocaine from Columbia, South America to Atlanta, Georgia and the Bahamas. Aside from the places of the actual importation, the defendant has not shown a correlation (and there is non apparent) between the location of other acts in furtherance of the conspiracies.

In regard to the members of the conspiracies, the Arkansas indictment named 18 indicted and unindicted conspirators; the Atlanta indictment named 33 conspirators. Of the conspirators named in both indictments, only Bonadonna and Charles J. Alaimo were included in both cases. Clearly, the conspirators in both cases are not sufficiently similar to suggest that there existed only a single, unified conspiracy. Indeed, the facts point to the contrary.

In light of the above recited evidence, the court finds that Bonadonna has failed to establish a prima facie

case of a violation of the Double Jeopardy Clause. Bonadonna's first assertion of error on this ground, therefore, is without merit.

II. Failure to Establish Three Title 21 Offenses as a Necessary Predicate to His Conviction for Continuing Criminal Enterprises.

Bonadonna contends that the government failed to establish the three predicate Title 21 felony offenses required under 21 U.S.C. § 848. Bonadonna raised this issue on appeal and it was decided adversely to him. This court follows the decision of the Eleventh Circuit in United States v. Rosenthal, 793 F.2d 1214, 1226-27 (11th Cir. 1986), that the government established sufficient evidence to convict Bonadonna of engaging in a continuing criminal enterprise. Specifically, the Eleventh Circuit rejected Bonadonna's contention that two unindicted acts were improperly presented to the jury as

predicate offenses for the CCE charge. The court held that the government is clearly entitled to use unindicted offenses to obtain a conviction under § 848. Id. Accordingly, Bonadonna's second assertion of error is without merit.

III. Brady Violation.

Bonadonna asserts that the government committed a Brady violation by failing to provide him with exculpatory evidence in the government's possession. Specifically, Bonadonna claims that the government failed to provide him with evidence that Pablo Escobar had been indicted for a murder which the government had indicated during Bonadonna's trial that Bonadonna had participated in. Bonadonna has plainly failed to offer any evidence that the government possessed the information regarding Escobar's indictment, that the information was exculpatory, or that it was beneficial or

even relevant to Bonadonna's defense. Absent such a showing there is no Brady violation. "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." United States v. Bagley, 473 U.S. 667, 675 (1985). Therefore, Bonadonna's third assertion of error is without merit.

IV. Failure to Submit Special Interrogatory.

Bonadonna contends that the trial court erroneously failed to submit to the jury his proposed special interrogatory form on the § 848 count. Bonadonna requested the special interrogatory to allow the jury to enumerate which acts it found to be the predicate acts for the § 848 charge. Bonadonna claims that the use of the general verdict renders it impossible to determine whether or not the jury based its verdict

upon an improper theory. This issue was raised by Bonadonna on appeal of this conviction to the Eleventh Circuit and was adjudicated adversely to him. See Rosenthal, 793 F.2d at 1226-27. Bonadonna has presented no direct authority to support his position and the court finds that his argument is baseless. Accordingly, the court finds that Bonadonna's fourth assertion of error is without merit.

For the foregoing reasons, the defendant's motion to vacate sentence and conviction is DENIED.

SO ORDERED, this 22nd day of February, 1993.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-8487

D.C. Docket Nos. 1:84-CR-14-3
1:92-CV-2209-GET

PHILIP ANTHONY BONADONNA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(July 28, 1994)

Before ANDERSON and BIRCH, Circuit Judges, and ALBRITTON*, District Judge.

Per Curiam: AFFIRMED. See 11th Cir. R. 36.1.

---

*Honorable W. Harold Albritton, III, U.S. District Judge for the Middle District of Alabama, sitting by destination.

Judgment Entered: July 28, 1994
For the Court: Miguel J. Cortez, Clerk

BY:_____
Deputy Clerk

FILED: July 28, 1994

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-8487

PHILIP ANTHONY BONADONNA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC

Before ANDERSON and BIRCH, Circuit Judges, and ALBRITTON*, District Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable W. Harold Albritton, III, U.S. District Judge for the Middle District of Alabama, sitting by destination.

FILED: October 20, 1994

ORD-42
(9/91)